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No.

Supreme Court, U.S.
FILED
08-425 SEP 26 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MANUEL GUERRA,

Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL OF FLORIDA, Bill McCollum,

Respondents.

On Petition for a Writ of Certiorari
to The United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

PAUL MORRIS
Counsel of Record
9130 S. Dadeland Blvd.
Suite 1528
Miami, FL 33156
(305) 670-1441

Counsel for Petitioner

QUESTION PRESENTED

WHETHER THE ELEVENTH CIRCUIT'S STANDARDS AND BURDENS OF PROOF APPLICABLE TO A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE PLEA PROCESS, AS WELL AS ITS RULE THAT THE RIGHT TO COMPETENT PLEA BARGAIN ADVICE IS AT BEST A PRIVILEGE, ARE IN CONFLICT WITH THOSE OF THIS COURT AND OTHER CIRCUITS AND WERE IMPROPERLY APPLIED IN DENYING THE PETITIONER'S CLAIM WHERE HIS COUNSEL MISTAKENLY ADVISED HIM THAT HIS SENTENCING EXPOSURE WAS A TWENTY-YEAR PRISON TERM IF HE REJECTED THE PROSECUTION'S PLEA OFFER AND THE PETITIONER WAS CONVICTED AFTER TRIAL AND SENTENCED TO IMPRISONMENT FOR THIRTY-FIVE YEARS AFTER DECLINING THE PLEA OFFER IN RELIANCE UPON COUNSEL'S MISADVICE.

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OPINION BELOW

A copy of the unpublished decision of the United States Court of Appeals for the Eleventh Circuit, *Guerra v. United States*, No. 07-11413 (11th Cir. March 28, 2008) affirming the denial of the petitioner's 28 U.S.C. § 2254 habeas corpus petition by the United States District Court for the Southern District of Florida, is contained in the Appendix. (App. 1-6).

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was filed on March 28, 2008. (App. 1-6). On May 12, 2008, the court of appeals entered an order denying the petitioner's timely filed petition for rehearing. (App. 7-8). A timely filed application for extension of time for filing this petition for writ of certiorari was granted to October 9, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A.

Petitioner, a state prisoner in Florida, was found guilty of second degree murder following a jury trial.

(App. 2). Petitioner filed in the state trial court a motion seeking postconviction relief arguing that he was denied his Sixth Amendment right to effective assistance of counsel in the plea process in violation of the standards promulgated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioner argued that the two pronged test of *Strickland* for ineffectiveness (deficient performance and prejudice) was met because (1) his trial attorney misinformed him that if he rejected the prosecution's plea offer of a 10-year prison term and was convicted after trial, he was facing a sentence of 20 years; and (2) relying upon counsel's misrepresentation, petitioner continued with the trial, was convicted, but was sentenced to more than 34 years in prison. *Id.*

The state trial judge conducted an evidentiary hearing upon petitioner's motion. (App. 19-39). Petitioner presented three witnesses: his lead trial attorney, Eric Feldman; co-counsel, Diane Ward; and himself. The State of Florida presented no witnesses and offered no evidence in rebuttal to petitioner's case. Mr. Feldman admitted his misadvice to the petitioner and corroborated the petitioner's testimony in all material respects. No contradictory testimony was offered by co-counsel.

Mr. Feldman explained that prior to trial, petitioner was amenable to a plea bargain. Indeed, petitioner directed him to inquire of the prosecution whether, if he pled guilty, a plea agreement could specify where the sentence would be served. However, no "firm offers" were made by the State (until the plea offer at issue was made during the trial) and therefore no agreement between the State and petitioner was reached. (App. 28-9, 31).

At trial, after the prosecution rested but before the defense commenced its case, the prosecutor approached

Mr. Feldman with a firm plea offer whereby petitioner would receive a prison sentence of 10 years in exchange for a plea of guilty to a reduced charge of manslaughter. (App. 22-4). The trial judge was informed of and approved the plea offer and ordered petitioner to reach a decision quickly as to whether the trial would continue. However, the judge did not participate in the plea process and was not in the courtroom when the plea offer discussion took place off the record between petitioner and his counsel. Neither the trial judge, prosecutor, or defense counsel ever advised petitioner of his sentencing exposure under the applicable state sentencing guidelines. (App.24-5).

Mr. Feldman testified that when he informed the petitioner of the plea offer, the petitioner "was torn, didn't know what to do." (App. 24). Petitioner asked Mr. Feldman: "[W]hat am I looking at if I continue with the trial?" (App. 24-5). Mr. Feldman testified: "I remember telling him twenty." (App.25). Mr. Feldman admitted at the postconviction hearing that he gave that answer of "twenty" even though he had *not* determined petitioner's sentencing exposure upon conviction for second degree murder. Nor did Mr. Feldman ever discuss with petitioner his sentencing guidelines exposure upon conviction. Mr. Feldman testified that he did not review a sentencing guidelines scoresheet with petitioner until after the trial, when a scoresheet prepared by the prosecutor was disclosed to the defense. (App. 25-6). Mr. Feldman opined that his mistaken answer influenced petitioner's decision to reject the 10-year sentence and continue with the trial. (App. 29-30).

On the day of sentencing, Mr. Feldman was surprised to see that the sentencing guidelines scoresheet prepared by the prosecutor calculated a sentence of 34 years. Mr. Feldman described

petitioner's reaction to that sentence as one of "shock." (App. 26-7). He recalled petitioner stating that he understood from Mr. Feldman that his sentencing exposure was no more than 20 years. (App. 27). Mr. Feldman testified that after the sentencing, petitioner was "obviously upset" and repeated that he had no idea that such a long sentence could be imposed upon him. (App. 27). Mr. Feldman specifically recalled petitioner stating to him that he would have accepted the 10-year plea offer had he known his sentencing exposure was more than 34 years. (App. 30). Mr. Feldman stated that he was fired by petitioner after the sentencing. (App. 27).

The testimony of co-counsel Ward was corroborative. Ms. Ward never prepared a sentencing scoresheet calculation in petitioner's case for two reasons. First, she did not know how. Second, she deemed Mr. Feldman responsible for that aspect of the petitioner's representation. Nor did she ever explain to petitioner his sentencing exposure. (App. 20-1). She stated that petitioner's reaction to the prosecutor's scoresheet calculation was one of a "high level of distress and surprise." (App. 22).

Petitioner's testimony was consistent with that of both trial counsel. Petitioner stated that upon being advised of the 10-year plea offer, he asked Mr. Feldman what sentence he was facing if found guilty after trial. Mr. Feldman answered that petitioner was facing 20 years. (App. 32). Petitioner understood from counsel's answer that the worst case scenario upon conviction after trial was a 20-year sentence. (App. 33). Petitioner did not know he was facing a 34-year sentence until the day of the sentencing. (App. 35-6). He proceeded with trial having relied upon Mr. Feldman's representation that the maximum sentence was 20 years. Petitioner testified that he would have

accepted the 10-year sentence had he known he was facing 34 years in prison regardless of his claim at trial of self-defense. (App. 33-4, 37).

Petitioner also confirmed Mr. Feldman's testimony that there were no firm plea offers prior to trial. Petitioner's understanding was that various plea proposals discussed prior to trial were never "on the table." (App. 33-4, 37-8). Petitioner confirmed that although plea agreements and counter-agreements were discussed, no agreement could be reached. (App. 33-4).

The state postconviction judge denied relief solely upon the following ground:

> With respect to Mr. Guerra's claim that the plea offer was improperly communicated to him because he was told that the most that he was facing was twenty years, I'm rejecting that claim. I find Mr. Guerra totally incredible. Once again, I find his testimony to be incredible. That motion is denied in its entirety.

(App. 39). The judge did not address the unrebutted testimony of the petitioner's trial attorneys.

Petitioner appealed his Sixth Amendment claim to the District Court of Appeal of Florida, Third District which affirmed without opinion, citing *Varela v. State*, 711 So. 2d 1343 (Fla.3d DCA 1998). See *Guerra v. State*, 924 So. 2d 944 (Fla.3d DCA 2006).

Petitioner filed a petition for writ of habeas corpus with the district court based upon his ineffective assistance of counsel claim. The district judge summarily denied the petition in a written order. (App. 8-18). The district judge found that petitioner failed to show prejudice under the second or prejudice *Strickland* prong, thereby rendering it unnecessary to

decide whether Mr. Feldman rendered deficient performance in violation of the first prong. (App. 16). The district judge interpreted the state postconviction judge's finding that petitioner was "totally incredible" to mean that petitioner was not credible when he testified that he would have accepted the 10-year plea offer had he known he was facing 34 years rather than only 20 years as misrepresented by his counsel. (App. 17). The district judge ruled that this credibility finding was not rebutted by clear and convincing evidence and therefore resulted in a failure of proof that petitioner suffered any prejudice from Mr. Feldman's misadvice. *Id.*

The petitioner appealed to the Eleventh Circuit. Reiterating its rule that "'[t]he right to competent plea bargain advice is at best a privilege that confers no benefit' because a defendant 'may make a wise decision' without assistance of counsel or a 'bad one despite superior advice from his lawyer,'" (App. 5-6) (quoting *Wofford v. Wainwright*, 748 F.2d 1505, 1508 (11th Cir.1984)), the Eleventh Circuit "proceed[ed] directly to the second step of the *Strickland* analysis" and affirmed on the following basis:

> There is no indication in the record, and certainly no clear and convincing evidence, that [petitioner] would not have accepted the 10-year offer absent trial counsel's advice concerning a 20-year sentence. Trial counsel did not testify that [petitioner] would have accepted the 10-year offer at any point in the proceedings. Rather, counsel described that [petitioner] had limited doubts regarding his defense and had rejected prior plea offers. On this

> record, [petitioner] has not shown that he would have pled guilty had counsel told him that he could receive at 34-year, as opposed to a 20-year, term.

(App. 6).

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit appears to be the only jurisdiction that holds, as it did in petitioner's case, that "'[t]he right to competent plea bargain advice is at best a privilege that confers no benefit' because a defendant 'may make a wise decision' without assistance of counsel or a 'bad one despite superior advice from his lawyer.'" (App. 5-6) (quoting *Wofford*, 748 F.2d at 1508)). The rule of the Eleventh Circuit is at odds with this Court's standards for assessing effective assistance of counsel in the plea process as well as the standards of the other circuits. Certiorari is requested to address and resolve this conflict.

There is also a conflict between the Eleventh Circuit and other circuits concerning a petitioner's burden under *Strickland* for obtaining relief based upon trial counsel's misadvice in the plea process. Here, petitioner's trial counsel admitted that he mistakenly informed the petitioner that he was facing a 20-year sentence if he rejected the State's 10-year plea offer and was found guilty by the jury. In reliance upon that misadvice, the petitioner continued with trial, was convicted, but received a 34-year sentence. Several circuits hold that although the prejudice prong of *Strickland* may not be satisfied based solely upon a petitioner's claim that he would have accepted a plea offer but for counsel's misadvice, the petitioner's burden of showing prejudice can be satisfied by

"objective evidence" such as testimony from trial counsel admitting the mistaken advice, or a substantial disparity between trial counsel's misrepresentation and the sentence actually imposed. Here, although the petitioner presented both types of objective evidence, the Eleventh Circuit nevertheless ruled that the petitioner's case lacked sufficient proof of prejudice. Certiorari is also requested to resolve this conflict among the circuits.

ARGUMENT

A. Petitioner's Sixth Amendment Claim

The petitioner's claim is a denial of the Sixth Amendment right to effective assistance of counsel that took place in the plea process when, during trial and in reliance upon his counsel's misadvice that he was only facing a 20-year sentence if convicted after trial, he rejected a plea offer of a 10-year term. The petitioner was found guilty and received a sentence of imprisonment for 34 years. At a postconviction hearing, petitioner's counsel admitted that he did not know the petitioner's sentencing exposure upon conviction and that his advice to the petitioner was wrong. Petitioner's counsel also testified that when he communicated the plea offer, the petitioner was "torn" between accepting the 10-year sentence and continuing with trial, thereby showing that the petitioner was amenable to accepting the plea offer. Counsel further testified that the petitioner relied upon the affirmative misadvice in deciding to reject the plea offer and continue with trial. Consistent with counsel's testimony, the petitioner testified that he would have

accepted the 10-year offer had he known he was actually facing imprisonment of 34 years upon conviction but that he relied upon counsel's misadvice in rejecting the offer. The State offered no evidence to dispute the testimony of counsel or the petitioner.

B. The Law of the Eleventh Circuit Regarding Effective Assistance of Counsel in the Plea Process

On appeal from the denial of his federal habeas corpus petition, the Eleventh Circuit affirmed. Unique to the Eleventh Circuit is its rule that "[t]he right to competent plea bargain advice is at best a privilege that confers no benefit' because a defendant 'may make a wise decision' without assistance of counsel or a 'bad one despite superior advice from his lawyer." *Wofford,* 748 F.2d at 1508. In rejecting the petitioner's Sixth Amendment claim, the Eleventh Circuit reiterated this rule and concluded that the petitioner failed to satisfy the prejudice prong of *Strickland* by not having shown that he would have pled guilty had he known he was facing 34 years in prison as opposed to a 20-year term. The ruling of the Eleventh Circuit is at odds with decisions of this Court as well as decisions of other circuit courts of appeals regarding the standards for determining ineffective assistance of counsel claims based upon misadvice by counsel in the plea process.

C. The Law of this Court and Other Circuits Regarding Effective Assistance of Counsel in the Plea Process

Generally, in order to establish ineffective assistance of counsel in violation of the Sixth Amendment, the defendant must satisfy the two elements of *Strickland.* First, the defendant must show

that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88, 104 S.Ct. at 2064. Second, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

There can be no doubt that there is a right to effective assistance of counsel in the plea process. After all, a defendant's decision whether to plead guilty or proceed to trial is a critical stage in a criminal proceeding for which he is entitled to counsel. See, *e.g.*, *Moran v. Burbine*, 475 U.S. 412, 431, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) ("Sixth Amendment right to counsel ... attach[es] ... after the initiation of formal charges"). Accordingly, in *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), this Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." Accord, *Wright v. Van Patten*, ___ U.S. ___, ___, 128 S.Ct. 743, 746, 169 L.Ed.2d 583 (2008). It necessarily follows that an ineffective assistance of counsel claim can be based upon the misadvice of counsel during the plea process. See *Bradshaw v. Stumpf*, 545 U.S. 175, 186, 125 S.Ct. 2398, 2408, 162 L.Ed.2d 143 (2005) (noting that the validity of a plea made upon the constitutionally defective advice of counsel is subject to attack).

In evaluating a claim of ineffective assistance of counsel in the plea process, "the first half of the *Strickland* test is nothing more than a restatement of the standard of attorney competence...." *Hill*, 474 U.S. at 59, 106 S.Ct. at 370. However, in order to satisfy the "prejudice" requirement, the defendant need only show that "there is a reasonable probability that, but for

counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59, 106 S.Ct. at 370. *See also Roe v. Flores-Ortega*, 528 U.S. 470, 485, 120 S.Ct. 1029, 1039, 145 L.Ed.2d 985 (2000) (reiterating prejudice test of *Hill* and applying similar test for prejudice to ineffectiveness of counsel claim for failure to file notice of appeal). This framework is also held to apply to claims that, but for counsel's misadvice, a defendant would have accepted a plea bargain and not have gone to trial. *See e.g., Magana v. Hofbrauer*, 263 F.3d 542, 547 (6th Cir.2001) (requiring that petitioner show deficient performance and that, but for counsel's advice, there was a reasonable probability he would have pled guilty); *United States v. Gordon*, 156 F.3d 376, 379-80 (2d Cir.1989) (recognizing ineffective assistance of counsel claim where counsel's misadvice regarding potential sentencing exposure caused defendant to reject plea offer).

D. The Conflict Warranting Certiorari Review

Contrary to the above-cited authorities, the Eleventh Circuit adheres to the view that the right to competent plea bargain advice is nothing more than a "privilege that confers no benefit because a defendant may make a wise decision without assistance of counsel or a bad one despite superior advice from his lawyer." The Eleventh Circuit is apparently alone in this view -- and this view is wrong because the right to effective assistance of counsel in the plea process is a Sixth Amendment guarantee. Additionally, the Eleventh Circuit unrealistically adheres to the reasoning that a defendant in the plea process is apt to "make a wise decision without assistance of counsel." As this and many other cases demonstrate, the ever-

increasing complexities of sentencing guidelines, scoresheets, and statutory schemes are resulting in numerous instances of counsel imparting to their clients incorrect assessments of sentencing exposure. Certiorari review of this important issue is respectfully requested.

E. The Circuit Conflict on "Objective Evidence"

Ordinarily, a petitioner's testimony, without more, that he would have accepted a plea offer but for counsel's misadvice, is insufficient to prove prejudice, for the obvious reason that any petitioner is likely to offer such testimony, whether true or not, in an attempt to reinstate a rejected plea bargain. *See e.g., Toro v. Fairman*, 940 F.2d 1065, 1066 (7th Cir1991) (defendant's statement that he would "have had to be insane not to accept the plea agreement" was self-serving and alone, insufficient to establish a reasonable probability that he would have accept the plea). Accordingly, several circuits hold that the petitioner's burden can be met through an additional showing of "objective evidence." For example, where the record shows a substantial disparity between a defendant's actual maximum sentencing exposure under applicable sentencing guidelines and the sentencing exposure incorrectly represented by defense counsel, the disparity is deemed sufficiently "objective" to establish a reasonable probability that the defendant would have accepted the plea offer. *See e.g., Riggs v. Fairman*, 399 F.3d 1179, 1183-84 (9th Cir.2005); *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir.2003); *Mask v. McGinnis*, 233 F.3d 132, 142 (2d Cir.2000); *United States v. Day*, 969 F.2d 39 (3d Cir.1992).

Here, the petitioner's testimony was so corroborated

by the substantial disparities between the sentence under the plea offer (10 years), counsel's incorrect advice (that the petitioner was facing 20 years if convicted after trial) and the petitioner's actual sentence (34 years). However, the Eleventh Circuit declined to follow those circuits where such a disparity constitutes "objective evidence" that satisfies the prejudice component of *Strickland*.

Several courts of appeals hold that objective evidence is also supplied by the testimony of a defendant's trial counsel that corroborates the critical aspects of his client's testimony. In *Boria v. Keane*, 99 F.3d 492 (2d Cir.1996), the defendant substantiated his allegation of prejudicial ineffective assistance by the testimony of his counsel who "made clear" that he never discussed with his client the advisability of accepting or rejecting the plea offer. *Boria*, 99 F.3d at 495. Boria's trial counsel testified that he "never gave his client any advice or suggestion" as to how to deal with the plea bargain. *Id.* at 497-98. Similarly in *Day*, supra, the Third Circuit remanded for an evidentiary hearing noting that defense counsel's corroboration "might qualify as sufficient confirming evidence." 969 F.2d at 45.

In this case, the testimony of petitioner's counsel corroborated his client's testimony. Counsel acknowledged that he misadvised the petitioner that he was facing only 20 years, rather than 34, if convicted after trial. However, in conflict with those circuits in which such testimony satisfies the prejudice prong of *Strickland*, the Eleventh Circuit adhered to a different standard, finding that the petitioner did not meet the prejudice prong because his trial counsel failed to testify that the petitioner "would have accepted the 10-year offer at any point in the proceedings." (App. 6). Arguably, the Eleventh Circuit

is calling for testimony from counsel that constitutes inadmissible speculation as to what his client might have done. But even if this were the proper standard, it was satisfied when counsel testified that the petitioner was amendable to pretrial plea bargaining that never resulted in a firm offer and that when the first firm plea offer was made during trial, the petitioner did not respond with outright rejection but instead was "torn" between the 10-year offer and what he believed to be his exposure of 20 years. Such testimony supported the petitioner's testimony that he would not have been so "torn" and would have accepted the offer if he had been accurately advised that the risk was 34 years (particularly considering the petitioner was born in 1949 and was therefore 51 years of age at the time of the plea offer).

The Eleventh Circuit's analysis is also in conflict with the standards applied by the Seventh Circuit in a case similar to the petitioner's, *Julian v. Bartley*, 495 F.3d 487 (7th Cir.2007). In *Julian*, the defendant was improperly informed by his trial counsel that the maximum sentence he could receive would be 30, rather than 60 years in prison. The Seventh Circuit found that habeas corpus relief was appropriate and that the petitioner satisfied the prejudice prong of *Strickland* where he relied upon counsel's misadvice in rejecting the plea offer of 23 years. The court reasoned that Julian was faced with the choice of accepting the plea offer of 23 years, or gamble by going to trial where he might be exonerated or face up to 30 years in prison.

> Julian believed he was only risking seven additional years for a chance at acquittal (the difference between the twenty-three the prosecutor offered to recommend and the third to which he could be sentenced

> after trial). In actuality, Julian was risking thirty-seven years for the chance at acquittal (the difference between the twenty-three the prosecutor offered and the sixty years to which he could be sentenced after trial). To gamble with seven years for the slim chance of acquittal might be a reasonable calculus for some. It is hard to imagine, however, that any reasonable defendant would be willing to risk thirty-seven years for the remote chance of acquittal. After all, sixty years is a life sentence for any defendant, particularly one who, like Julian, was thirty-eight at the time of sentencing.

Julian, 495 F.3d at 499. Accordingly, the Seventh Circuit found that Julian presented more than his own self-serving allegation that he would have taken the plea but for counsel's misadvice. See also *United States v. Morris*, 470 F.3d 596 (6th Cir.2006) (counsel provided ineffective representation in violation of *Hill* and *Strickland* when she told defendant that federal prosecution would result in sentence between 60 and 68 months when actual range was 101 or 111). The identical reasoning and standards should have applied to the petitioner's case.

For the foregoing reasons, certiorari review is warranted to review the conflicting decision of the Eleventh Circuit.

F. The Additional Conflict Generated by the Eleventh Circuit's View of the Deficiency Component of *Strickland* in the Plea Process

Although the Eleventh Circuit decided the petitioner's case after stating that it would "proceed directly to the second step of the *Strickland* analysis," the court briefly addressed the first or deficient performance prong of *Strickland* in a footnote. The petitioner addresses that footnote for two reasons. First, it might be viewed as an alternative holding; and second, the analysis in the footnote generates conflict on important matters also worthy of resolution by this Court. In the footnote, the Eleventh Circuit found that the petitioner did not meet the first prong of *Strickland* for two reasons, the first being the following:

> We pause to note that on this record, Guerra's habeas petition fails at the first stop of *Strickland* since, contrary to Guerra's claim in this appeal, there is no indication that trial counsel affirmatively misinformed him that he faced a 20-year maximum sentence. Rather, counsel advised Guerra that he had a "winnable case" and was "looking at twenty years."

(App. 6, n.1).

Whether counsel advised the petitioner he "faced a 20-year maximum sentence" or that he "was looking at twenty years" makes no difference. Even if counsel was offering an opinion, that does not change the analysis. As the Seventh Circuit stated in *Julian*:

> [T]he [state] appellate court's conclusion that because [trial counsel] provided an

> opinion rather than a guarantee, he could not have provided ineffective assistance of counsel is a non-sequitur. *** What [counsel] told [petitioner] about a thirty-year sentence was clearly wrong and therefore objectively unreasonable. In fact one would be hard pressed to find a lawyer who guaranteed a client anything. Guarantees in the law are hard to come by, particularly in the topsy-turvy world of sentencing. Were we to constrain claims for ineffective assistance of counsel only to those who received guarantees from their lawyers, we surely would eviscerate the law regarding the right to effective assistance of counsel.

Julian, 495 F.3d at 495-96.

Here, petitioner was clearly asking, as any reasonable accused in his position would have, for legal advice that any reasonably competent counsel could provide, namely, what would happen if he rejected the plea offer and was found guilty after trial. Counsel's response was clearly and grossly incorrect. The Eleventh Circuit's treatment of counsel's misadvice squarely conflicts with the *Strickland* deficient performance standards in general and with *Julian* in particular.

The Eleventh Circuit's other reason for "pausing to note" that petitioner failed to meet the first step in *Strickland* was the following:

> Moreover, Guerra was previously advised that he faced a potential maximum sentence of life imprisonment, if convicted of second-degree murder.

(App. 6, n.1). The Eleventh Circuit was apparently referring to the petitioner's pretrial bond hearing and what the State of Florida contended took place there (although no record of the hearing was offered by the State). The State contended that the bond judge advised the petitioner of the statutory maximum penalty for the offense charged. Even assuming that the State's contention is accurate, the Eleventh Circuit's conclusion does not follow. A brief discussion of the law of Florida regarding pretrial bond hearings shows why.

In *State v. Arthur*, 390 So. 2d 717 (Fla.1980), the Supreme Court of Florida held that an accused charged with a capital or life imprisonment offense is entitled to a bond hearing (also known in Florida as an "*Arthur* hearing") and the setting of bond unless the proof is evident or the presumption of guilt great. The petitioner was charged with a life imprisonment offense and was therefore afforded a pretrial bond hearing wherein he was likely so advised. However, the petitioner was never facing a sentence of life imprisonment if convicted after trial. Rather, as petitioner's trial counsel correctly testified, the petitioner's sentencing exposure if convicted after trial would be determined not by the statutory maximum, but by the applicable state sentencing guidelines. Mr. Feldman correctly understood that petitioner was <u>not</u> facing either the death penalty or life imprisonment if found guilty by the jury. Rather, petitioner was facing a guidelines sentence of a term of years in prison. Thus, the Eleventh Circuit was clearly mistaken in equating petitioner's knowledge that he was afforded a pretrial bond hearing because his charged offense was statutorily classified as a life felony with a failure to show deficient performance of trial counsel when he

advised the petitioner that he was facing 20 years in prison if convicted after trial.

G. The State Appellate Court's Decision

The state appellate court rejected the petitioner's constitutional claim based solely upon that court's prior decision in *Varela*. Although the Eleventh Circuit did not review the decision of the state appellate court, an examination of *Varela* shows that the state court's resolution of the ineffective assistance of counsel claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ..." and/or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d)(1), (2).

In *Varela*, prior to the start of jury selection, defendant Varela was offered a plea to a term of seven years. A plea discussion took place in open court and the trial judge participated. The judge informed Varela that the maximum sentence which could be imposed if he were convicted after trial would be life imprisonment. Varela asked the judge to undercut the prosecution's offer by a lesser prison term. The judge refused. Varela then asked for a one day continuance to think about the plea offer. The judge denied the request but allowed Varela to confer privately in the jury room with his counsel to discuss the plea offer. After the conference, Varela returned to the courtroom, declined the plea, continued with the trial, was convicted, and sentenced to 25 years in prison. Varela filed a postconviction motion claiming ineffective assistance of counsel.

At the evidentiary hearing, Varela testified that he had no recollection of either the trial judge or his counsel advising him of the possibility of a life sentence (in direct contradiction to the trial court's advisement of such during the plea discussion in open court). Varela also testified that his trial counsel opined that in the event of conviction, he would in all likelihood receive a ten-year sentence. In contrast, Varela's defense counsel testified that he had repeatedly told Varela of the possibility of an enhanced sentence of up to life imprisonment and merely indicated that Varela might likely receive a ten-year sentence if convicted. The trial judge denied the postconviction motion and Varela appealed.

On appeal, the reviewing court affirmed, finding in pertinent part that Varela "emphatically rejected the [state's offer] even *prior* to his counsel's expressed opinion that [the defendant] would probably receive a ten year sentence from the lower court upon conviction." *Id.* at 1345 (emphasis supplied).

The undisputed facts in the case at bar are materially different from the facts of *Varela*. Here, the petitioner's trial judge did NOT participate in the plea process (other than to approve the 10-year sentence). Nor did the trial judge here advise the petitioner of his sentencing exposure to 34 years in prison. (Neither did the prosecutor or defense counsel so inform the petitioner.) Additionally, the petitioner did not reject the plea offer until *after* he specifically asked trial counsel what sentence he was facing if convicted after trial and only *after* trial counsel affirmatively misrepresented the sentence as 20 years. Moreover, the petitioner specifically and detrimentally relied upon trial counsel's answer and would not have continued with the trial had he known he was facing 34 years in prison. These critical and undisputed facts clearly

distinguish *Varela*. Thus, habeas relief was warranted because the decision of the state reviewing court, relying solely upon *Varela,* necessarily "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d)(2).

H. Summation

This case involves important constitutional questions about the correct legal standards to be applied and the proof required to establish prejudice under this Court's decisions in *Strickland* and *Hill.* Additionally, in the other circuits that have addressed these questions at length and under similar facts, the testimony of the petitioner, along with that of his trial counsel, and consideration of the sentencing disparities, would have been sufficient to establish prejudice (as well as deficient performance). Certiorari review is respectfully requested for consideration and clarification of these important questions.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted

Respectfully submitted,

PAUL MORRIS
Counsel of Record
9130 S. Dadeland Blvd.
Suite 1528
Miami, FL 33158
(305) 670-1441

Counsel for Petitioner

DATED: September, 2008